

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Line-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

**To: The Commission**

**PETITION FOR PARTIAL RECONSIDERATION OF  
THE BLOOSTON RURAL CARRIERS**

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## Summary

The Blooston Rural Carriers respectfully submit the following issues for the Commission to reconsider regarding the Mobility Fund Phase I Rules:

First, the Commission should reconsider the reverse auction procedures adopted in the *Order*, as they will surely create a “race to the bottom” that will not serve the public interest. Construction and equipment quality short-cuts and other gaming strategies can result in deceptively low “winning bids” and are likely to require larger disbursements of high-cost support in the long term to replace inferior facilities. Further, reverse auction proceedings are susceptible to anti-competitive bidding practices by large carriers that do not need the funds to expand service. Instead of reverse auctions, the Commission should instead let carriers qualify on the basis of qualitative factors including their prudently determined costs to serve (which should not be dependent on hypothetical cost models).

In the event that the Commission upholds reverse auctions, a mechanism must be implemented that assures that a significant portion of the Mobility Fund goes to the small rural wireless carriers that already serve or hold spectrum to serve the sparsely populated areas found to be unprofitable by the nationwide carriers, particularly those areas that are in or adjacent to the rural carriers’ certificated telephone service area. The Commission failed to adequately address concerns that the ‘lowest per-unit bids across all areas’ procedure unduly and inequitably favors large carriers when adopting its reverse auction framework. The history of spectrum auctions has shown that small and rural carriers were successful bidders only when adequate protections were implemented, including spectrum set-asides, substantial bid credits, and the restriction of license sizes. Accordingly, the Blooston Rural Carriers respectfully submit that the Commission should

implement remedial measures to help ensure that a significant percentage of Mobility Fund dollars go to local businesses that have a significant stake in seeing that the needs of their citizens, communities and anchor institutions are met, including significant bidding credits to *bona fide* small businesses and affordable roaming rights for small carriers on other networks.

Second, the Blooston Rural Carriers urge the Commission to preserve the benefits of the voluntary phase-down commitments made by Verizon Wireless and Sprint in exchange for valuable merger concessions. Verizon remains the largest wireless carrier in the country, rivaled only by AT&T. USF funds are still limited, and the Mobility Fund rules must recognize that no Tier One carrier requires financial assistance in order to complete its buildout. On reconsideration, the Commission should prevent this form of “corporate welfare” by banning Tier I carriers from participating in the Mobility Fund.

Third, the Mobility Fund should not be tailored to provide funding for sites to be added to an existing system. It should also be available to help defray the costs of “green field” projects by rural wireless carriers. While the *Order* appears to express an intent not to fund the construction of new systems, it is respectfully submitted that the *Order* fails to recognize that many remote rural areas can be substantially served with an initial build that will be no larger than the highway “fill in” efforts of larger carriers.

Fourth, the Commission should further require that service providers certify that they will not participate in exclusive arrangements for the design and/or procurement of handsets and other equipment as a condition of receiving Mobility Fund support. Small and rural carriers have made a substantial showing concerning the harms to competition and to rural consumers that have arisen from the preponderance of exclusivity arrangements for the most sought-after

wireless devices. The Commission's lack of consideration on this matter is arbitrary and capricious, and a failure by the Commission to engage in reasoned rulemaking.

Finally, the Commission should require any 3G buildouts done with Mobility Fund dollars to be readily upgradeable to 4G and later standards.

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**To: The Commission**

**PETITION FOR PARTIAL RECONSIDERATION OF  
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The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its clients listed in Attachment A (the “Blooston Rural Carriers”) and pursuant to Section 1.429 of the Commission’s Rules, hereby petitions for reconsideration of that portion of the Commission’s *Report and Order and Further Notice of Rulemaking*, FCC 11-161, released

November 18, 2011 (“Order”),<sup>1</sup> in the captioned proceeding that adopts and discusses Phase I of the Mobility Fund. The Blooston Rural Carriers ask the Commission to reconsider its decision to award Mobility Phase I support via a reverse auction mechanism because as described below, the Mobility Fund rules as adopted will hinder the ability of small, rural carriers to extend wireless services to remote regions within their service areas, and instead will establish a corporate welfare system for some of the largest corporations in the world.

## **I. Statement of Interest**

The Blooston Rural Carriers are providers or resellers of wireless telecommunications and information services over licensed and/or unlicensed frequency bands, or are planning to commence the provision of licensed or unlicensed wireless services within the foreseeable future. Many are wireless divisions or affiliates of rural telephone companies, but are participating in this proceeding on behalf of their existing or prospective wireless operations. The Blooston Rural Carriers participated in the proceedings below, by filing comments on December 16, 2010<sup>2</sup> in the Commission’s Mobility Fund Notice of Proposed Rule Making in WT Docket No. 10-208.<sup>3</sup>

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<sup>1</sup> *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund*; Report and Order and Further Notice of Proposed Rulemaking, WC Dockets No. 10-90, 07-135, 05-337, 03-109; CC Dockets No. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, released November 18, 2011 (“Order”).

<sup>2</sup> Comments of the Blooston Rural Carriers, WT Docket No. 10-208, filed December 16, 2010 (“Blooston Mobility Comments”).

<sup>3</sup> *In the Matter of Universal Service Reform – Mobility Fund*, Notice of Proposed Rulemaking, WT Docket No. 10-208, released October 14, 2010. (“Mobility Fund NPRM”).

## **II. The Reverse Auction Procedures Adopted By the Commission Will Create a “Race to the Bottom” That Will Not Serve the Public Interest.**

In the *Order*, the Commission establishes a reverse auction mechanism to distribute Mobility Phase I support, stating simply that “a reverse auction is the best way to achieve our overall objective of maximizing consumer benefits given the available funds.”<sup>4</sup> This assertion, however, is not adequately supported by the record. As discussed below, numerous commenters, the Blooston Rural Carriers among them, pointed out a number of pitfalls involved in the reverse auction process, which the Commission does little to address.

As the Blooston Rural Carriers argued in the notice and comment proceeding, reverse auctions are susceptible to a number of shortcomings that ultimately undermine the Commission’s intention of expanding existing coverage to unserved areas in the most economic way possible.<sup>5</sup> The Blooston Rural Carriers remained concerned that construction and equipment quality short-cuts and other gaming strategies can result in deceptively low “winning bids” and are likely to require larger disbursements of high-cost support in the long term to replace inferior facilities.<sup>6</sup> Other commenters added to the list of concerns, pointing out that reverse auction proceedings are also susceptible to anti-competitive bidding practices by large carriers that do not need the funds to expand service.<sup>7</sup> The Commission’s response to these concerns was limited to the following:

The Blooston Rural Carriers, among others, argue that reverse auctions can lead to construction and equipment quality short-cuts due to cost cutting measures. We must of course define clear performance standards and effective enforcement of those standards, as is prudent when seeking any commitment for specific performance. We expect that bidders will consider cost-effective ways of fairly

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<sup>4</sup> *Order* at ¶322.

<sup>5</sup> Blooston Mobility Comments at 2-3.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> See Comments of the Rural Cellular Association, WT Docket No. 10-208, filed December 16, 2010, at 11.



meeting those requirements, which in turn is consistent with our objective to extend coverage for mobile services as much as possible given available funds.<sup>8</sup>

While the Commission's response to these concerns is the observation that "we must of course define clear performance standards and effective enforcement of those standards", no such standards are adopted. Moreover, while the Blooston Rural Carriers agree that any funding distribution method requires clear and enforceable standards, they respectfully submit such measures are not enough in this case. Rather, the only way to effectively encourage high-quality expansion into unserved areas is to ensure that funding is directed to carriers that have a legitimate interest in building and maintaining high-quality service in these areas. Rural carriers have served the areas that the large carriers have ignored for decades, and have a continuing and vested interest to do so through strong ties to the communities they serve.

Instead of reverse auctions, the Commission should choose a method of distributing funds that takes into account an equitable comparison and evaluation of the differing cost and service characteristics of different technologies, rights of creditors and repayments of outstanding loans, and the treatment of carrier of last resort obligations, costs,<sup>9</sup> as well as past performance and experience providing service in the kinds of areas that generally remain unserved. Because the Commission has determined that one (and only one) carrier will received funding to build out an unserved area, it is important to take into account more factors than simply which entity can claim to do the job for the least amount of money. The Commission should instead let carriers qualify on the basis of qualitative factors including their prudently determined costs to serve (which should not be dependent on hypothetical cost models).

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<sup>8</sup> Order at ¶325.

<sup>9</sup> See, e.g., Blooston Mobility Comments at 2.

At minimum, if the Commission insists on proceeding with the reverse auction mechanism, it should reconsider the factors that determine distribution of funds on reconsideration, as discussed in detail below.

**III. If Reverse Auctions are Held, a Mechanism Must be Used that Assures that a Significant Portion of the Mobility Fund Goes to the Small Rural Wireless Carriers that Already Serve or Hold Spectrum to Serve their Sparsely-Populated Service Areas.**

In the event that the Commission upholds its decision to employ reverse auctions, a mechanism must be implemented that assures that a significant portion of the Mobility Fund goes to the small rural wireless carriers that already serve or hold spectrum to serve the sparsely populated areas found to be unprofitable by the nationwide carriers, particularly those areas that are in or adjacent to the rural carriers' certificated telephone service area.

In the *Mobility Fund NPRM*, the Commission sought comment on whether it should impose any other eligibility requirements on entities seeking to receive support from the Mobility Fund, including whether there are any steps it should take to encourage smaller eligible parties to participate in the Mobility Fund.<sup>10</sup> In response, the Blooston Rural Carriers urged that Mobility Fund procedures give rural telephone companies and other small businesses "a fair and equitable opportunity to receive support, and not employ the proposed 'lowest per-unit bids across all areas' procedure that unduly and inequitably favors large carriers."<sup>11</sup> Similar sentiments were echoed by a number of others in their comments and reply comments.<sup>12</sup>

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<sup>10</sup> Mobility Fund NPRM at ¶55.

<sup>11</sup> See Blooston Mobility Comments at 2-3 and 5-8.

<sup>12</sup> See, e.g., Comments of the Joint Center for Political and Economic Studies, WT Docket No. 10-208, filed December 16, 2010, at 4-5; Comments of Rural Cellular Association, WT Docket NO. 10-208, filed December 16,

However, the Commission failed to adequately address these legitimate concerns when adopting its reverse auction framework for the Mobility Fund. Instead, the Commission dismissed small and rural carrier arguments out of hand with the following conclusory statement:

For a variety of reasons noted elsewhere, we are confident that both the auction design and natural advantages of carriers with existing investments in networks in rural areas should provide opportunities for smaller providers to compete effectively at auction.<sup>13</sup>

Furthermore, the Commission declined to bar any particular class of party, with specific reference to size advantages, on the ground that the general auction rules (similar to present day spectrum auction rules) and the as-yet-undetermined Mobility Fund auction procedures to provide “a fair opportunity for serious, interested parties to participate.”<sup>14</sup> It is respectfully submitted that the Commission’s failure to examine the issues and concerns raised by the Blooston Rural Carriers and others is arbitrary and capricious. The history of spectrum auctions has shown that small and rural carriers were successful bidders only when adequate protections were implemented, including spectrum set-asides, substantial bid credits, and the restriction of license sizes. Even with these measures, the Commission’s license records reflect that the larger carriers have dominated the auctions. Without such measures, small carriers would have had no realistic chance at the small measure of success they have been able to achieve.

Yet, the *Order* does not appear to provide any of the measures that present-day spectrum auction rules provide to ensure competitive participation by small carriers, such as bidding credits. As the Blooston Rural Carriers pointed out, “Section 309(j)(3) of the Communications

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2010, at 5-6, 9; Comments of Rural Telecommunications Group at 7-8 and 10-14; Comments of Mid-Rivers Communications, WT Docket No. 10-208, filed December 16, 2010, at 6.

<sup>13</sup> *Order* at ¶326.

<sup>14</sup> *Order* at ¶409.

Act requires Commission spectrum auctions to be designed and conducted, *inter alia*, in a manner to ‘promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a variety of applicants, including small businesses [and] rural telephone companies.’ 47 U.S.C. §309(j)(2).”<sup>15</sup> If the Commission intends to rely on existing spectrum auction principles, it must do so in a way that ensures the Section 309(j) small business and rural telephone company requirement is met.

The Commission’s reliance on undetermined further procedures provides little comfort for rural carriers who are routinely at a disadvantage to larger carriers. Rather, the Commission should, on reconsideration, take real, concrete, active steps to ensure equal opportunity and competitive participation amongst all carriers, such as the requirement for an apples-to-apples comparison of small service areas, and the introduction of bidding credits for small businesses, similar to the Tribal bidding credit currently provided for in the *Order*.<sup>16</sup>

The Blooston Rural Carriers also pointed out that Broadband Technology Opportunities Program (BTOP) grants and Broadband Initiatives Program (BIP) grant/loans appear to have been distributed equitably to a varied group of large, mid-sized and small entities, and suggested that these programs were successful largely because NTIA and RUS had selected projects on the basis of qualitative factors such as project purpose, benefits, viability, budget and sustainability. Other commenters suggested that qualitative factors should play a more significant role in

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<sup>15</sup> Blooston Mobility Comments at 4-5.

<sup>16</sup> *Order* at ¶490.

making sure the Mobility Fund serves its intended purpose.<sup>17</sup> The *USF/ICC Order* fails to adequately address commenters' proposed use of these qualitative factors in identifying projects that should receive funding.

As it is currently designed, participation in the Mobility Fund will significantly favor large, nationwide carriers whose capital and operating costs are significantly lower than small and rural service providers. For instance, the use of road miles as the measure of a successful bid will favor large carriers proposing to cover highways, rather than small carriers trying to provide wireless to the truly remote areas that cannot otherwise be served without the benefit of Federal funding – i.e., the stated purpose of the Mobility Fund.

Accordingly, the Blooston Rural Carriers respectfully submit that the Commission should implement remedial measures to help ensure that a significant percentage of Mobility Fund dollars go to local businesses that have a significant stake in seeing that the needs of their citizens, communities and anchor institutions are met. Such remedial measures would include granting significant bidding credits to *bona fide* small businesses.

The Commission should also implement safeguards to ensure fair participation by small businesses and rural carriers. Specifically, the roaming requirement discussed in the *Order*<sup>18</sup> must be made to flow in both directions, such that potential recipients of Mobility Fund support that are small or rural carriers are able to obtain roaming rights on other networks in order to compete. As rural carriers have long pointed out, large carriers have little or no incentive to

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<sup>17</sup> See, e.g., Comments of Rural Telecommunications Group at 8-10.

<sup>18</sup> *Order* at ¶¶397-398.

negotiate roaming with small rural carriers, despite the requirements of the Commission's rules.<sup>19</sup> As the Commission decided to go beyond its existing roaming rules to ensure Mobility Fund Phase I recipients would offer roaming, so should it go beyond the existing roaming rules to ensure they are able to receive it elsewhere, as well.

Additionally, the Commission must ensure that roaming is affordable. Because the customers of a small carrier spend more time roaming on other networks than other networks' customers spend roaming on the small carrier's networks, it is possible for roaming costs under the current rules to mount rapidly. Therefore, the Blooston Rural Carriers also urge the Commission to take steps to ensure that roaming is affordable for small carriers. Otherwise, many small and rural carriers may ultimately suffer *losses* from roaming arrangements where their customers spend more time roaming than on the home network.

The Commission should also prohibit the use of package bidding, as the ability to accumulate census blocks into one large bid proposal will create an apples-to-oranges comparison that will heavily favor large carriers. Currently, the issue of package bidding is left to the Wireless Telecommunications Bureau to decide under delegated authority.<sup>20</sup>

Finally, as discussed below, the Commission should limit the entities that can seek Mobility Fund dollars based on size and need.

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<sup>19</sup> See, e.g., Comments of North Dakota Network Company, WT Docket No. 05-265 (filed Nov. 18, 2005); Comments of the National Telephone Cooperative Association, WT Docket No. 05-265 (filed Nov. 28, 2005); Comments of the Blooston Rural Carriers, WT Docket No. 05-265 (filed June 14, 2010).

<sup>20</sup> Order at ¶426.

#### **IV. Tier One Carriers Should Not Be Allowed to Participate in the Mobility Fund.**

The Commission states that it will not bar any party from seeking Mobility Fund Phase I support based solely on the party's past decision to relinquish Universal Service Funds provided on another basis, with specific reference to the relinquishment of support by Verizon Wireless and Sprint in exchange for valuable merger concessions.<sup>21</sup> Specifically, the Commission concludes that there is no inconsistency with these entities' relinquishment of support under the identical support rule because under that rule, there was no specific obligation to expand voice coverage where it was lacking.<sup>22</sup> This conclusion is plainly in error.

Rather, the *entire purpose* of the Universal Service Fund is to expand the availability of telecommunications services, including voice services, to all consumers, including those in low income, rural, insular, and high cost areas at rates that are reasonably comparable to those charged in urban areas.<sup>23</sup> Furthermore, the Commission expressly conditioned recent mega-mergers by both Verizon and Sprint on a phase-down of USF support over a five year period, finding that such a phase-down was unequivocally in the public interest.<sup>24</sup> Yet, in refusing to bar such entities from seeking Mobility Fund Phase I support, the Commission inexplicably casts

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<sup>21</sup> *Id.* at ¶408.

<sup>22</sup> *Id.*

<sup>23</sup> 47 USC § 254(b)(3).

<sup>24</sup> *Applications of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling That the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) (*Verizon Wireless Merger Order*); *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17570 (2008) (*Sprint Merger Order*).

aside these facts (along with the concomitant benefits they represented) with hardly any consideration.

In the context of the Verizon-Alltel merger, the Commission stated as follows:

[t]he proposed transaction constitutes a merger of the largest wireless company in the United States, based on revenues, as well as the number of retail customers, with another wireless company that is the largest recipient of the high-cost competitive ETC support. Such unique facts and large scope of this transaction compel us to condition our approval of the proposed transaction on Verizon Wireless's commitment to phase down its competitive ETC high cost support over five years, as discussed herein.”<sup>25</sup>

The Blooston Rural Carriers respectfully submit that nothing has substantially changed. Verizon and its subsidiaries had net income of \$10.217 billion in 2010 and \$11.601 billion in 2009, compared to \$3.962 billion in 2008.<sup>26</sup> Verizon Wireless remains one of the largest wireless providers in the country, rivaled only by AT&T.<sup>27</sup> And, were it not for the Commission's conditioning the Alltel merger upon a phase-down of USF receipts, it stands to reason that the merged entity would have remained the largest recipient of high cost funding, as well.

At the same time, the Commission has repeatedly warned of the tight funding limits under which it seeks to accomplish its goal of extending wireless services to unserved areas under Mobility Phase I.<sup>28</sup> The Commission accepted the USF phase-downs proposed by Verizon

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<sup>25</sup> *In re Verizon Wireless & Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17532 (F.C.C. 2008).

<sup>26</sup> Verizon Communications 2010 Annual Report, Consolidated Statements of Income – As Adjusted, p. 42.

<sup>27</sup> Verizon Wireless boasts 107.7 million connections, see <http://aboutus.verizonwireless.com/ata glance.html>; AT&T boasts approximately 97 million, see [http://www.att.com/Investor/Financial/Earning\\_Info/docs/1Q\\_11\\_slide\\_c.pdf](http://www.att.com/Investor/Financial/Earning_Info/docs/1Q_11_slide_c.pdf); Sprint is the next closes with some 51 million, see *Sprint Nextel First Quarter 2011 Results*, available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Mzk1MDg5M3xDaGlsZEIEPTQyNDA2OHxUeXBIPtI=&t=1> (Websites last visited December 28, 2011).

<sup>28</sup> See, e.g., *Order* at ¶¶ 321, 323, and 337.



and Sprint in order to alleviate such cost limitations.<sup>29</sup> Yet, the *Order* would undo any benefits reaped from the withdrawal of Tier I giants like Verizon and Sprint from USF by allowing these companies to simply re-apply for funding before they have even finished the phase-out conditions on the lucrative mergers they have been allowed to complete.

In this regard, the Mobility Fund rules must recognize that no Tier I carrier actually requires financial assistance in order to complete its buildout. While AT&T is not subject to an existing phase-down order, it had net income of \$19.864 billion in 2010 and \$12.138 billion in 2009, and a loss of \$2.625 billion in 2008<sup>30</sup> (or an average annual net income of \$9.792 billion during the three-year period). Notwithstanding the fact that the recent annual profits of either AT&T or Verizon could fund the entire proposed \$4.5 billion annual high-cost program budget with room to spare (in fact, AT&T could take a complete second lap), the Commission is looking to give them substantial new CAF and Mobility Fund support (as well as major access and reciprocal compensation savings) without any reference to their earnings. On reconsideration, the Commission should prevent this form of “corporate welfare” by banning Tier I carriers from participating in the Mobility Fund.

#### **V. The Mobility Fund Should Be Available for Rural Carriers to Launch Small Wireless Systems.**

The Mobility Fund should not be tailored to provide funding for sites to be added to an existing system. It should also be available to help defray the costs of “green field” projects by rural wireless carriers. For many rural carriers holding RSA-sized licenses, the money that would

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<sup>29</sup> See Sprint Merger Order; Verizon Wireless Merger Order.

<sup>30</sup> AT&T Inc. 2010 Annual Report, Consolidated Statements of Income, p. 59.

allow a Tier I carrier to add a few sites to an existing system could give the rural carrier the funding it needs to accomplish a significant portion of its initial implementation in an area that is otherwise currently unserved. This would be consistent with the purpose of the Mobility Fund as stated at paragraph 324 of the *Order*:

We observe that the areas eligible for Mobility Fund Phase I funding generally are ones where the economics have not been sufficient to date to attract private investment. While it may be true that some of these areas potentially could be built out using private investment over time, our goal in establishing the Mobility Fund is to provide the necessary “jump start” to accelerate service to areas where it is cost effective to do so.

There are numerous RLECs that have a vested interest in providing wireless service to truly remote areas, because these areas are in or adjacent to the carriers’ certificated telephone service areas, and such areas can often be served with a relatively small number of cell sites; however, these carriers need an economic “jump start” that will enable them to overcome the high initial costs of reaching remote areas that often feature rugged terrain, lack of good roads and an extremely low population density. While the Order appears to express an intent not to fund the construction of new systems,<sup>31</sup> it is respectfully submitted that the Order fails to recognize that many remote rural areas can be substantially served with an initial build that will be no larger than the highway “fill in” efforts of larger carriers.

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<sup>31</sup>See, e.g., *Order* at ¶340 (“However, the areas that currently lack basic mobile services are likely to be among the most difficult or expensive to serve and would likely require significant ongoing support to remain operational. Given the limited size and scope of the Mobility Fund Phase I, we do not believe that this support mechanism, even with a priority for completely unserved areas, would most efficiently address those areas. Rather, we address these areas in the parts of this Order and the FNPRM addressing ongoing support for wireless services and highest cost areas.”).

## **VI. Exclusive Equipment Arrangements Should Not be Allowed for Mobility Fund Applicants.**

In its Mobility Fund NPRM, the Commission proposed that recipients of Mobility Fund support would be subject to public interest obligations, including data roaming and collocation requirements.<sup>32</sup> The Blooston Rural Carriers suggested that the Commission should further require that service providers certify that they will not participate in exclusive arrangements for the design and/or procurement of handsets and other equipment as a condition of receiving Mobility Fund support.<sup>33</sup> However, the Commission failed to adopt this measure in its Mobility Fund rules, and it never discussed why imposing a limitation on handset exclusivity arrangements upon Mobility Fund recipients would not be in the public interest.

Small and rural carriers have made a substantial showing concerning the harms to competition and to rural consumers that have arisen from the preponderance of exclusivity arrangements for the most sought-after wireless devices.<sup>34</sup> It is well established that these arrangements impair the service and competitive options of smaller carriers, deprive the customers of such smaller carriers of roaming capabilities and service features, and increase the cost of the mobile broadband services and equipment available to customers of smaller carriers.<sup>35</sup>

In its discussion of “other qualifications” for Mobility Fund recipients, the Commission makes a passing reference to the Blooston Rural Carriers’ proposal at Paragraph 407 of the *Order*. Yet there is no meaningful analysis or discussion of the pros and cons of adopting a limitation on handset exclusivity arrangements, and no explicit disposition of this issue. Mere

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<sup>32</sup> See *Mobility Fund NPRM* at ¶36.

<sup>33</sup> See Blooston Mobility Comments at 8-9.

<sup>34</sup> See Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497, (*filed* May 20, 2008); Comments of Blooston Rural Carriers, RM-11497, (*filed* Feb 2, 2009).

<sup>35</sup> *Id.*

citation to the Blooston Rural Carriers' proposal is hardly sufficient, and it provides no evidence that the Commission even considered the matter. Ignoring the proposal is arbitrary and capricious, and a failure by the Commission to engage in reasoned rulemaking.<sup>36</sup>

## **VII. Funding Should Go Toward 4G Construction or 3G Construction that Can Be Reasonably Upgraded to 4G in the Near Future.**

During the underlying rulemaking, the Blooston Rural Carriers asserted that, because of the substantial existing and potential funding demands upon Universal Service Fund ("USF") programs, the Commission should expressly restrict participation in the Mobility Fund reverse auction to bidders whose proposed third generation ("3G") mobile wireless broadband networks and facilities are capable of ready, efficient and economical conversion to fourth generation ("4G") mobile wireless broadband networks.<sup>37</sup> Paragraph 37 of the Mobility Fund NPRM had expressly asked whether supported 3G networks should be required to present a path to 4G service. In this regard, the Blooston Rural Carriers observed that some 3G facilities and equipment can be readily and economically converted to 4G networks, but that others cannot. It appears that some of the non-convertible 3G facilities and equipment would have to be extensively reconfigured at great expense to provide 4G services, and that others might need to be replaced in substantial part.

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<sup>36</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 462 US 29, 43 (1983) (Holding "the requirement that an agency action not be arbitrary and capricious includes a requirement that an agency adequately explain its result"); *Evangelical Lutheran Church in America v. Immigration and Naturalization Service*, 288 F.Supp 2d 32, 47 (D.C. Cir. 2003) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 US 633, 654 (1990) (Stating agencies must take whatever steps are necessary, "to provide an explanation that will enable the court to evaluate the agency's rationale at the time of the decision.")).

<sup>37</sup> Blooston Mobility Comments at 3-5.

The *Order* discusses the difference between 3G and 4G supported services at paragraph 360, but fails to specifically address the Blooston Rural Carriers' request that 3G be supported only if it is readily upgradable. Instead, the Commission merely concluded:

Mobile service providers receiving non-recurring Mobility Fund Phase I support will be obligated to provide supported services over a 3G *or better* network that has achieved particular data rates under particular conditions. Specifically, Phase I recipients will be required to specify whether they will be deploying a network that meets 3G requirements or 4G requirements in areas eligible for support as those requirements are detailed here.<sup>38</sup>

It is respectfully submitted that the Commission should take the opportunity on reconsideration to address the Blooston Rural Carriers' request head on. As this Commission is well aware, funding for the proposed Mobility Fund and for other existing and contemplated USF programs is subject to considerable and increasing needs as the current mixed-use public network evolves more and more toward a National Broadband Network. Small wireline and wireless carriers need sufficient USF support to continue providing quality and affordable voice and data services in high-cost rural areas, and are likely to need increased support to continue upgrading their networks to deploy broadband facilities and services at speeds that are reasonably comparable to those available in urban areas.

At a time when there are substantial competing needs for USF funding, it would be unreasonably inefficient and wasteful for the proposed Mobility Fund to support capital expenditures for non-convertible 3G facilities and equipment when superseding 4G service roll-outs are already being advertised in urban areas. Scarce USF funds should not be used to deploy non-convertible 3G facilities that are likely to become outmoded and will need to be replaced by

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<sup>38</sup> *Order* at ¶360.

4G networks within the immediately foreseeable future. It will be far more efficient and less expensive in the longer run to require the Mobility Fund to support only 3G facilities and equipment that can be readily and economically converted to 4G services, or to postpone its operations for a year or two until 4G facilities and equipment become readily available.

## **VIII. Conclusion**

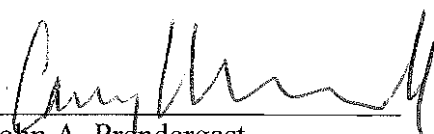
The Blooston Rural Carriers appreciate the Commission's effort to fashion the Mobility Fund as a means of directing support to the remote areas that still lack advanced wireless services. However, as shown above, the Commission erred in addressing certain very important issues surrounding its proposed Mobility Fund rules. In certain cases identified above, the Commission was presented with facts and arguments by the Blooston Rural Carriers and others, and simply failed to address the issue raised at all, which is an arbitrary and capricious failure to provide the public and the courts with a record adequate to judge whether the Commission's actions were justified. In other cases, including the critical creation of the mechanism for awarding Mobility Fund grants, the Commission enunciated a plan, but the plan failed to adequately address important facts reflected in the record, and as a result reached an erroneous decision. Moreover, the Commission failed to consider alternatives (such as bid credits and other protections for small rural carriers) that would have better ensured that the purposes of the Mobility Fund were fulfilled, while at the same time meeting the Congressional mandate in Section 309(j) to facilitate rural telephone carrier participation in the provision of advanced wireless services to their rural service areas.

It is vital that the Commission correct these shortcomings in the *Order*. See *Jacob Siegel Co. v. FTC*, 327 US 608 (1946)(remanding case in which FTC ordered company to abandon allegedly deceptive brand name but did not reasonably consider whether a lesser alternative method would suffice); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, (1971) (A reviewing court must determine “whether the decision was based on a consideration of the relevant factors”; Failure to consider the concerns that animated the rulemaking casts doubt on the reasonableness of the agency's decision-making process.) Cf. *Natural Resources Defense Council, Inc. v. SEC*, 196 U.S. App. D.C. 124, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979); *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872 (D.C. Cir. 1999); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995), citing *City of Brookings Municipal Tel. Co.*, 822 F.2d at 1169 (“The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules. The failure to do so permits reversal of the FCC's attribution rule.”). 47 C.F.R. § 1.425 (“The Commission will consider all relevant comments and material of record before taking final action in a rulemaking proceeding and will issue a decision incorporating its finding and a brief statement of the reasons therefor.”); Courts have long held that an agency must respond to “relevant” and “significant” comments. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977); see also *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252-53 (2d Cir. 1977); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (stating that once a comment is “significant enough to step over the threshold requirement of materiality,” the “lack of agency response or consideration becomes a concern”). The opportunity to comment is meaningless unless the agency responds to significant points raised by the public. *Portland Cement Ass'n v. Ruckelshaus*, supra, 486 F.2d at 393-394.

Based on the foregoing, it is respectfully requested that the Commission revise the *Order* on reconsideration, consistent with the showings made herein.

Respectfully submitted,

**BLOOSTON RURAL CARRIERS**

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**The Blooston Rural Carriers**

Big Bend Telephone Company, Inc.  
Butler-Bremer Communications  
Clear Lake Independent Telephone Company  
Custer Telephone Cooperative, Inc.  
Gold Star Communications, LLC  
Manti Telephone Company  
Midstate Communications, Inc.  
Northeast Louisiana Telephone Company, Inc.  
NNTC Wireless, Inc.  
Public Service Telephone Company  
Penasco Valley Telephone Cooperative, Inc.  
Sagebrush Cellular, Inc.  
Smithville Telecom, LLC  
Strata Networks  
Walnut Telephone Company, Inc.  
West Texas Rural Telephone Cooperative, Inc.  
Wiggins Telephone Association  
WUE, Inc.